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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 339

ANTHONY VERZI and JOHN VERZI,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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TABLE OF CONTENTS.

Citations to Opinions Below ---- 1

Jurisdiction ---- 2

Questions Presented ---- 2

Constitutional Provisions Which the Case Involves ---- 3

Statement of the Case ---- 3

Reasons for Granting Writ ---- 5

1. Whether the fact that the Petitioners were denied the rights guaranteed by Section 10 of Article I of the Ohio Constitution and of the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution in that the trial court's denial of a request for a continuance by counsel who had been reengaged less than 24 hours before the matter was set for trial which in effect deprived the Petitioners of the right to counsel and due process of law ---- 5

2. Were the Petitioners denied a fair trial and due process by the admission into evidence by the trial judge of uncorroborated and unsubstantiated testimony by a police officer as to an incriminating conversation between the Petitioners which he reportedly overheard by means of a microphone device hidden in or about their jail cell ---- 11

Conclusion ---- 15

Appendix:

Journal Entry of the Court of Common Pleas ---- 16

Journal Entry of the Court of Appeals ---- 16

Order of the Supreme Court of Ohio Dismissing the Appeal ---- 17

Constitutional Provisions ---- 18

TABLE OF AUTHORITIES.

Cases.

American National Insurance Company v. Euce, 2 Ohio App. 299 (1913) 13

Leonard v. Mowbray, 21 Ohio App. 268 (1926) 13

Meggenson v. Bilan, 40 Ohio App. 210 (1931) 14

People v. Simpson (Cal. App.), 88 P. 2d 175 (1939) 8

Powell v. Alabama, 287 U. S. 45 (1932) 9

State v. Richardson, 329 Mo. 805 (1947) 9

Texts.

23 *A. L. R.* 1378 7

71 *A. L. R.* 5 14

11 *O. Jur.* 2d p. 169 7

Constitutions.

Constitution of Ohio:

Art. I, Sec. 10 ..... 2, 3, 9, 10, 18

Constitution of the United States:

Amendment V 2, 19

Amendment VI 2, 3, 9, 19

Amendment XIV 2, 3, 19

Statutes.

Ohio Revised Code:

Sec. 2945.58 ..... 5, 6, 7, 10

Sec. 4549.05 ..... 1, 3

Sec. 4549.06 ..... 1, 3

28 U. S. C. A. 1257 (3) 2

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. ----------.

ANTHONY VERZI and JOHN VERZI,

Petitioners,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

To the Supreme Court of the State of Ohio:

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Ohio entered in this cause on the 14th day of April, 1965, dismissing the appeal of the Petitioners from a conviction under Ohio Revised Codes 4549.05 and 4549.06.

CITATIONS TO OPINIONS BELOW.

The Journal Entry of the Court of Common Pleas of Summit County appealing the judgment entered by the Municipal Court of Cuyahoga Falls, Ohio is unreported and it is printed in Appendix, *infra*, page 16.

The Journal Entry of the Court of Appeals of the Ninth Appellate Judicial District of Ohio, Summit County, affirming the conviction is unreported and is printed in Appendix, *infra*, page 16.

The order of the Supreme Court of the State of Ohio dismissing the appeal April 14, 1965 is unreported and is printed in Appendix, *infra*, page 17.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. 1257 (3) which section pertinently provides:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * for any title, right, privilege or immunity especially set up or claimed under the Constitution."

This cause involves a violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED.

1. Whether the fact that the Petitioners were denied the rights guaranteed by Section 10 of Article I of the Ohio Constitution and of the Fifth, Sixth, and Fourteenth Amendments of the Federal Constitution in that the trial court's denial of a request for a continuance by counsel who had been reengaged less than 24 hours before the matter was set for trial which in effect deprived the Petitioners of the right to counsel and due process of law.

2. Were the Petitioners denied a fair trial and due process by the admission and evidence by the trial judge of uncorroborated and unsubstantiated testimony by a police officer as to an incriminating conversation between the Petitioners which he reportedly overheard by means of a microphone device hidden in or about their jail cell.

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The pertinent portions of the provisions of the Constitution of the State of Ohio are set below "* * * in any trial and any court the party accused shall be allowed to appear and defend in person and with counsel." Ohio Constitution, Article I, Section 10.

The pertinent portions of the provisions of the United States Constitution herein involved are set below

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial * * * and to have the assistance of counsel for his defense." United States Constitution Amendment VI.

"* * * Nor shall any state deprive any person of life, liberty, or property without due process of law." Amendment 14, Section 1, Clause 2.

STATEMENT OF THE CASE.

On the 15th of April, 1961 the Petitioner, Anthony Verzi, was arrested in Cuyahoga Falls, Ohio and placed in custody in the Cuyahoga Falls jail at approximately 5 a. m. of said morning. Later that day, officers from Cuyahoga Falls arrested John Verzi, one of the Petitioners, and confined him to the Cuyahoga Falls jail at approximately 10:15 p. m. The Petitioners were subsequently charged with violation of R. C. 4549.05 and R. C. 4549.06, theft of automobile tires and the tampering of various automobile locks. Counsel, Marvin A. Koblentz, was originally retained by the Petitioners to represent them; subsequently thereto the Petitioners retained two other attorneys to represent them replacing the original counsel. On December 5, 1961, less than 24 hours before the commencement of the Petitioners' trial the trial court engaged in a pretrial conference with a Mr. Fanelley, a member of the

Akron Bar, and the record indicates that the trial court was under the impression that Mr. Fanelley would represent the Petitioners during the course of their trial.

On December 5, 1961 on the eve of the scheduled trial the Petitioners contacted original counsel, Mr. Koblentz, and urgently requested that he represent them; thereupon, prior to the convening of the Court on December 6, counsel immediately notified the trial court of the last-moment retention of counsel and in order to prepare for the trial of said cause requested the trial court for a 72 hour continuance which was denied.

During the course of the trial over the objections of the Petitioners the Court admitted into evidence and placed decisive weight upon totally uncorroborated and unsubstantiated testimony of a police officer as to incriminating conversation between the Petitioners which he reportedly overheard by means of a microphone device being hidden in or about their jail cell.

REASONS FOR GRANTING WRIT.

1. **Whether the fact that the Petitioners were denied the rights guaranteed by Section 10 of Article I of the Ohio Constitution and of the Fifth, Sixth, and Fourteenth Amendments of the Federal Constitution in that the trial court's denial of a request for a continuance by counsel who had been reengaged less than 24 hours before the matter was set for trial which in effect deprived the Petitioners of the right to counsel and due process of law.**

It is the contention of the Petitioner that the trial court committed error in refusing to grant a continuance so as to permit defense counsel a sufficient opportunity to adequately prepare and present a defense for the accused based upon an alibi in accordance with the terms of Ohio Revised Code Section 2945.58. The need for this continuance was made abundantly clear at the outset of the trial (Bill of Exceptions, p. 4):

> "Mr. Koblentz: If the Court pleases, I would like to request the Court to note in the record that counsel for the defendants, although originally retained by the Defendants, was discharged and replaced subsequently by other members of the bar, who actively engaged themselves in the Defendants' behalf. Late yesterday afternoon, less than 24 hours before the matter was scheduled to be heard, the Defendants requested that I represent them."

The court overruled this request for a continuance in these words (Bill of Exceptions, page 5):

> "The Court: * * * Well, I am going to overrule the request for a continuance at this time. The reasons for it being that the affidavits in this case were made and filed on the 7th day of April, 1961; that the Defendants have had ample time, certainly, to file any defense that they wish to make in this cause. They

have had, to the Court's knowledge, in between the original hiring of Mr. Koblentz and the recent hiring of Mr. Koblentz, other counsel that the Court is aware, Mr. Valorie and Mr. Fanelly of the Akron Bar."

It is not disputed that the Petitioner had the benefit of counsel at all times between the date on which the affidavits were filed and the date set for trial. Of far greater significance, however, is the fact that the attorney upon whom was placed the ultimate responsibility of the defense *during trial* was vested with his authority on the day before the date set for trial. Not until he was placed in charge of the Petitioners' defense on December 5, 1961, did Mr. Koblentz have the opportunity to learn from the Petitioners that the evidence at their disposal which dictated the necessity of invoking the defense of alibi was not filed. What was known or planned by those representing the Petitioners prior to the last-moment retention of counsel is of no importance, for the latter was called into this case at a time when no amount of diligence on his part could have brought compliance with R. C. 2945.58. Accordingly, after determining the appropriateness of the defense of alibi, counsel for the Petitioners sought a continuance long enough only to allow him to file the required Notice of Alibi and thereby give the accused an opportunity to present the evidence and defense which in his judgment would best serve the interest of his clients and the demands of substantial justice.

In refusing to grant the requested continuance, the trial court placed formal legalisms above considerations of impartial justice and thereby acted arbitrarily and in abuse of the discretion granted to it in these matters. In its practical effect, this ruling by the trial court forced the Petitioners to proceed to trial without having any opportunity to establish the most vital and cogent phase of their defense.

In considering whether or not the court below abused its discretion in refusing to grant the requested continuance, the following considerations are particularly significant:

(1) A mere continuance of two days would have been sufficient to have allowed the Petitioners to secure compliance with R. C. 2945.58.

(2) In no way whatsoever would the State have been prejudiced by such a continuance.

(3) No amount of diligence on the part of defense counsel from the date of his being given final responsibility for the defense could have brought compliance with R. C. 2945.58.

(4) This is a criminal proceeding in which the accused's inability to set forth all of the components of his defense will most certainly result in his being committed to prison.

It is the general rule that the granting or refusing of a motion for a continuance rests with the sound discretion of the trial court, and an appellate court will not interfere with the exercise of this discretion unless it clearly appears, from all the facts and circumstances, *"that there has been an abuse of this discretion, operating to the prejudice of the party in the final determination of the case * * *."* 11 *O. Jur.* 2d p. 169. (Emphasis supplied.) In the broadest sense, it is the duty of the trial court to see that the guaranty conferred by the Constitution, upon every citizen charged with a crime, that he is entitled to a trial in accordance with the principle of substantial justice and fairness, is upheld and sustained.

It is now well established that a refusal to grant a continuance which results in depriving the accused of his right to have a reasonable time to prepare his defense may constitute reversible error. 23 *A. L. R.* 1378. It has thus

been held that to deny counsel a reasonable time to prepare for trial is to strip the right of representation of much of its value; see *People v. Simpson* (Cal. App.), 88 P. 2d 175 (1939) where it was held that the trial court abused its discretion in forcing counsel to proceed to trial although she had been retained *only two days* before the case was set for trial and hence was unable to fully prepare the defense.

The court below was unmindful of the basic truth that a request for a continuance of a trial is but a means to an end. The end is but a fair trial. The discretionary standards by which such a motion is to be measured are but a secondary means, and if their application, though apparently proper at the time, seems to have been unjust, or to have had a prejudicial result, the error ought to be corrected by the appellate court. *What should profoundly concern the court on review is whether the right end was achieved—whether there is substantial justice in the verdict.* If it appears there is not, the appellate court should be sensitive to the situation and should not permit the accused to be sacrificed on the altar of legal formalism, too literally applied:

> "In this instance, the trial court operated its machinery too rapidly * * *. In refusing to allow them a reasonable opportunity to prepare their defense, the trial court deprived the defendants of their right to a fair and impartial trial, and the judgment and sentence of the trial court, if exacted, would deprive the defendants of their lives without due process of law * * *. Of course, speedy trials and prompt execution of the judgments of courts are desirable; but if the time ever comes when they may be obtained by a disregard of well-established principles of law, then life, liberty, and property will no longer be secure. 'Surely it is better that justice travel with leaden foot, rather than

that she should walk rough-shod over the constitutional rights of citizens.' "

State v. Richardson, 329 Mo. 805 (1947).

In the instant case, the concept of due process was offended when as the price of being denied a forty-eight hour continuance the Petitioner was deprived of the opportunity to propound a defense which in his attorney's judgment would have served him well by reason of the nature of the case.

There is no justification for forfeiting a man's liberty, however shocking his crime, without a trial and conviction in conformity with substantial justice. It is an inviolate right of free men to have the assistance of counsel when being prosecuted for the commission of a crime. Constitution of Ohio, Article I, Sec. 10; Constitution of the United States, Sixth Amendment, U. S. C. A. This constitutional guaranty of the right to counsel imports the right to counsel to have the opportunity to be prepared. To compel the Petitioner to go into a trial upon which hinges his liberty and freedom without a reasonable opportunity to present a defense which in but two more days would be theirs to present is not technical; it goes to the very foundation of justice. Concerning such, the United States Supreme Court has thus spoken:

"The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

Powell v. Alabama, 287 U. S. 45 (1932).

The law securing to one (accused) the assistance of counsel must not be permitted to become a barren right. Accordingly, on the basis of the foregoing considerations of substantial justice, it is respectfully submitted that the trial court exercised its discretion unsoundly and oppressively in overruling the Petitioners' motion for a continuance.

Upon the overruling of the Petitioners' motion for a continuance, counsel, on behalf of the Petitioners, requested the following:

> "Now, if the Court pleases, in order to insure substantial justice, I hereby request that the notice of alibi be waived, or be allowed to be filed instanter, thus allowing the testimony of several key witnesses in the interest of justice." (Bill of Exceptions, p. 5.)

The above request being made in view of the provision of R. C. 2945.58 which specifically provides that "In the event of failure to provide the written notice (of alibi) the Court *may* exclude evidence offered by the defendants for the purpose of proving such alibi."

The Court summarily overruled the aforementioned request, and it is the Petitioners' contention by so doing deprived the Petitioners of due process of law as provided in the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Ohio.

2. Were the Petitioners denied a fair trial and due process by the admission into evidence by the trial judge of uncorroborated and unsubstantiated testimony by a police officer as to an incriminating conversation between the Petitioners which he reportedly overheard by means of a microphone device hidden in or about their jail cell.

It is the Petitioners' contention that it is apparent on the record that the State did not sustain its burden of establishing the Petitioners' guilt beyond a reasonable doubt and therefore the verdict was not sustained by good and sufficient evidence. Furthermore, the record reveals that the court erred in denying the Petitioners' motion for a directed verdict of acquittal at the close of the State's case. Specifically, the record indicates that the delicate balance between conviction and acquittal was distorted by reason of the court admitting into evidence and then placing decisive weight upon the totally uncorroborated and unsubstantiated testimony of Police Officer Thomas Formby as to an incriminating conversation between the Petitioners which he purportedly overheard by means of a microphone device hidden in or about their jail cell (Bill of Exceptions, p. 275):

> "The Court: As to the Defendant John Verzi, there are some circumstances, and we have the conversation which the Court admitted into evidence; the conversation that was overhead over the microphone. *Had I not admitted that into evidence, I most assuredly would have sustained your motion for a direct verdict in your favor, Mr. Koblentz.*" (Emphasis supplied.)

It is the Petitioners' contention that Officer Formby's testimony regarding this electronically overheard conversation should have been excluded or, in the alternative, given minimal weight for the reason that it was totally *uncorrob-*

orated and lacking in the legal essentials of proper identification.

The record contains numerous examples of the tenuous structure upon which this testimony rested (Bill of Exceptions, p. 252):

> "Q. All right, what conversation did you hear between *the people of the jail, the Verzis?* (Emphasis supplied.)
>
> A. As I had turned it on, there was some conversation that didn't pertain to anything in particular, and then *one said,* 'where did you go?' And *he said,* 'I ran between the houses.' And *he says,* 'Where did you go then?' *He said,* 'why didn't you get up and run?' *He said,* 'I was afraid he would shoot me.' *He said,* 'Oh, no, they fire warning shots first, and that's only when they miss.' After that, I called *somebody* in the office and asked them, 'Did you hear that?' They were too far across the room to hear it. There is just a little box upon the wall." (Emphasis supplied.)

This excerpt from Officer Formby's testimony, together with the questions put to him, consistently identify the overheard conversants as "the people of the jail," "the Verzis," "he said" and "one said." At no time was the Petitioner John Verzi specifically identified as the conversant who supposedly uttered this damaging testimony. No effort was made by the State to attribute any specific part of this conversation to the Petitioner. For what is contained in this alleged conversation, it is impossible to know which part if any of the conversation was that of John Verzi. For all that is shown, the entire conversation may well have been a monologue or, at best, a dialogue in which the Petitioner and Anthony Verzi were indistinguishable participants. Despite this inexcusable obscuring of identities, testimony of this conversation was

admitted into evidence to the prejudice of the Petitioner whose role therein was never clarified nor defined. The damage done to the defense by reason of the court receiving this testimony into evidence despite its lack of a foundation of specific identification cannot be underestimated (Bill of Exceptions, p. 275).

Officer Formby testified regarding a conversation which he apparently overheard between persons identified only as "he said" and "one said." The location of this conversation was said to have been in two jail cells occupied by the Petitioners. Beyond this, the State made no further effort to attribute any specific portion of this conversation to the Petitioners. Inasmuch as Officer Formby was unable to specify which of the conversants uttered any specific portion of the conversation, and inasmuch as the audibility of that "little box upon the wall" was conceded to be less than adequate for the room it was in ("they were too far across the room to hear it"), it was prejudicial error for this testimony to be placed before the jury without the slightest pretense of any supportive or corroborative evidence.

In suggesting that prejudicial error was committed by the trial court in admitting into evidence Officer Formby's testimony as to the conversation he purportedly overheard, the Petitioners urge this Court to apply the general considerations of reliability which are traditionally demanded by courts relative to the admissibility of overheard telephone conversations. *Leonard v. Mowbray*, 21 Ohio App. 268 (1926).

It was well established that overheard telephone conversations are admissible in evidence only after the identity of the conversants or speakers is shown satisfactorily to the court. *American National Insurance Company v. Euce*, 2 Ohio App. 299 (1913). The identity of the specific

voices which were supposedly overheard must be established with reasonable certainty. 71 *A. L. R.* 5. And see *Meggenson v. Bilan,* 40 Ohio App. 210 (1931), where testimony as to an overheard telephone conversation was admitted only *upon a positive identification by the eavesdropper of each of the parties to the conversation.*

In the instant case, it must be repeatedly emphasized that in his testimony, Officer Formby made *no* identification of the Petitioner as being either the "he" or the "one" to which he alluded in his testimony. The record reveals no evidence whatsoever that any of the incriminating segments of the overheard conversation were in fact uttered by the Petitioner. At no time during the proceeding was the Petitioner identified as being the individual who uttered any portion of the conversation testified to by Officer Formby. Even if the Petitioner had been the only individual in the Cuyahoga Falls jail at the time the conversation was supposedly overheard, it would have been necessary for Officer Formby's testimony to be accompanied by a specific and exact identification of the individual voice or voices to which he had been listening.

It is further brought to this Court's attention that this purely dubious uncorroborated testimony could have been very easily corroborated, if it had existed at all, by Patrolman Formby flicking the switch back on and giving other police personnel the opportunity to hear the alleged conversation (Bill of Exceptions, p. 254).

The witness further claimed he mentioned the conversation with Detective Hammick the following day but had not confronted the Petitioners and repeat what he had heard (Bill of Exceptions, pp. 254-255).

This Court's attention is directed that nowhere throughout the testimony does Detective Hammick mention the alleged testimony of the "overheard jail conversa-

tion" nor that Patrolman Formby had brought it to his attention. Petitioner John Verzi testified that no one had confronted him and the first he ever heard of such conversation was in the court room (Bill of Exceptions, p. 337).

CONCLUSION.

It is quite apparent that there has been an infringement of the Petitioners' constitutional rights in that the Petitioners were not afforded the ultimate benefits to be had by reason of due process of law of the constitutional guarantee of the right to counsel. In addition, the judgment was not substantiated by good and sufficient evidence and was against the weight of all the evidence.

For the reasons set forth herein, it is contended that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARVIN A. KOBLENTZ,

Attorney for Petitioners.

APPENDIX.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(January 28, 1964.)

This appeal from the Municipal Court of Cuyahoga Falls having been submitted upon the records and the briefs of Counsel without argument, the Court upon a review of the entire transcript and upon consideration of the assignment of error and the briefs of counsel on the authorities, finds as follows:

1. There was no abuse of discretion as shown by the refusal of the trial court to permit late filing of the alibi plea of the defendants.

2. The trial court properly admitted the testimony of a police officer who overheard conversation between the defendants in the jail cell. Accordingly, it is hereby Ordered, Adjudged and Decreed that the judgment of the trial court will be and hereby is affirmed and the cause remanded to the Municipal Court of Cuyahoga Falls for the imposition of sentence upon the defendants.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(November 11, 1964.)

This cause came on for hearing on October 5, 1964 upon the appeal on question of law from a judgment of the Court of Common Pleas of Summit County, Ohio, affirming judgments of the Municipal Court of Cuyahoga Falls, Ohio, convicting the Appellants of several offenses against the criminal law of the State of Ohio, and was argued by counsel for the parties.

Following careful reading of the record, including the transcript of the testimony, and an examination of the

exhibits, as contained in the bill of exceptions, this Court finds no error prejudicial to the rights of the Appellants, and, specifically, no error of prejudicial character within the two assignments of error presented on appeal, which are:

1. In the trial court's refusal to grant Defendant-Appellants' request for a continuance on the day set for trial;

2. The trial court overruling the Appellants' motion for a directed verdict and acquittal at the close of the State's case and the verdict was not sustained by good and sufficient evidence and was against the weight of all the evidence.

IT IS, THEREFORE, THE ORDER OF THIS COURT that the judgment of the Court of Common Pleas of Summit County, Ohio, affirming judgment of the Municipal Court of Cuyahoga Falls, Ohio, is hereby affirmed.

Exceptions.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL.

(Filed April 14, 1965.)

This cause, here on appeal as of right from the Court of Appeals for Summit County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant costs herein expended; that a mandate be sent to

the Cuyahoga Falls Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

CONSTITUTIONAL PROVISIONS.

Article I Section 10 of the Constitution of the State of Ohio.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witnesses whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witnesses face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered

by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Amendment V to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the assistance of counsel for his defense.

Amendment XIV to the Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INDEX

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ISSUE	
DID THE TRIAL COURT INFRINGE PETITIONERS' CONSTITUTIONAL RIGHTS IN REFUSING TO GRANT A CONTINUANCE AT THE TIME OF TRIAL?	2
ISSUE	
WAS THE ADMISSION INTO EVIDENCE BY THE TRIAL JUDGE OF INCRIMINATING STATEMENTS VOLUNTARILY MADE BY THE PETITIONERS WHILE INCARCERATED A VIOLATION OF THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS ...	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases Cited

	Page
Berman v. U.S., 378 U.S. 530 (1964)	5
Gaston v. Paige, 9 O.S. 397 (1859)	2
Ford v. State, 121 O.S. 292, 168 N.E. 139 (1929)	3
Holt v. State, 11 O.S. 691 (1860)	2
Leonard v. Mowbray, 21 O. App. 268 (1926)	7
Loeffner v. State, 10 O.S. 598 (1857)	2
Lopez v. U.S., 373 U.S. 427 (1963)	8
Massiah v. U.S., 377 U.S. 201 (1964)	7
Powell v. Alabama, 287 U.S. 45 (1932)	5
State ex rel Buck v. McCabe, 140 O.S. 535, 45 N.E. 2d 763 (1942)	2
State v. Frabutt, 88 O.L. Abs. 5, 18 O.O. 2d 277 (1961)	4

Statutes

2945.58 Ohio Revised Code	2

Texts

21 O. Jur. 2d 209	7
Wigmore on Evidence, 1954 Edition, P. 405	7

STATEMENT OF THE CASE

On the 5th of April, 1961, Cuyahoga Falls Police apprehended co-petitioner Anthony Verzi at the scene in a residential area in Cuyahoga Falls, at approximately 5:00 A.M. Later the same morning, the Cuyahoga Falls Police Department apprehended his brother, John Verzi, at his home and placed him in the Cuyahoga Falls Municipal Jail at approximately 10:15 A.M. The petitioners were charged with violation of Ohio Revised Code Section 4549.05 and 4549.06, theft of automobile tires and tampering with automobile locks. The petitioners were represented by counsel, Marvin A. Koblentz, shortly after they were apprehended. Subsequent to the initial stages of the criminal proceeding, Mr. Koblentz was discharged by the petitioners, and the petitioners retained two attorneys to prepare their defense, Mr. Valorie and Mr. Fanelly. Mr. Valorie and Mr. Fanelly continued to represent the defense until shortly before trial on December 6, 1961. Shortly before trial, on the 5th of December, 1961, the petitioners discharged Mr. Valorie and Mr. Fanelly and against retained the original counsel, Marvin A. Koblentz. The case came on for trial on the 6th of December, 1961, a jury having been called at which time counsel for the petitioners, Mr. Koblentz, requested a continuance so that written notice of alibi could be presented in accordance with Ohio Revised Code Section 2945.58. The court overruled the motion for a continuance; the matter proceeded to trial; the jury subsequently found them both guilty of violations of Sections 4549.05 and 4549.06.

In the course of the trial, the State presented evidence of conversation overheard between the petitioners, Anthony Verzi and John Verzi on the day of their apprehension, April 5, 1961, while incarcerated in the Cuyahoga Falls Municipal Jail. This conversation was overheard at the desk by means of an intercom system between each cell in the Cuyahoga Falls Jail and the Desk Sergeant. The speaker was in no way concealed or hidden in the jail cell, in which the petitioners' voluntary statement was made and subsequently overheard by the Police Department.

ISSUE

DID THE TRIAL COURT INFRINGE PETITIONERS' CONSTITUTIONAL RIGHTS IN REFUSING TO GRANT A CONTINUANCE AT THE TIME OF TRIAL?

It is the general rule in Ohio that the granting or refusal of a motion for continuance rests with the sound discretion of the trial court. Caston v. Paige, 9 O.S. 397 (1859); Loeffner v. State, 10 O.S. 598 (1857); Holt v. State, 11 O.S. 691 (1860); State ex rel Buck v. McCabe, 140 O.S. 535, 45 N.E. 2d 763 (1942).

An appellate court will not interfere with the exercise of this discretion unless it clearly appears from all of the facts and circumstances, that there has been an abuse of this discretion operating to the prejudice of the party in the final determination of the case. Caston v. Paige, supra. In the case at hand, the attorney for the petitioners requested a continuance for the purpose of filing the notice of alibi with the prosecutor. The statutory provision regarding the notice of alibi reads as follows:

> "Whenever a defendant in a criminal cause proposes to offer in his defense, testimony to establish an alibi on his behalf, such defendant shall, not less than three days before the trial of such cause, file and serve upon the prosecuting attorney, a notice in writing of his intention to claim such alibi ... If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of providing such alibi." 2945.58 Ohio Revised Code.

The attorney for the petitioners, Marvin A. Koblentz, was originally retained by the petitioners at the initial stages of the proceeding. Subsequent to the initial stages of the criminal proceedings, Mr. Koblentz was discharged by the petitioners. Between the discharge of Mr. Koblentz and the date of the trial, the petitioners retained two attorneys to prepare their defense, Mr. Valorie and Mr. Fanelly. Less than twenty-four hours before the trial was to commence, Mr. Koblentz was rehired by the petitioners. Up to the date of the trial, no notice of alibi had been filed with the prosecuting attorney. On the day set for trial, Mr. Koblentz requested the continuance to file the notice of alibi for John Verzi. It should be noted that the petitioners, at

all times, from the commencement of the criminal proceedings were ably assisted by counsel. As an alibi is an integral part of the defense of the accused, if such had been made known to any of the three defense attorneys intermittently retained by John Verzi prior to the trial date, certainly the notice of alibi would have been timely filed with the prosecuting attorney. However, such was not the case. John Verzi waited until less than twenty-four hours before the trial was scheduled to commence. We can only assume that this delay in making the alibi known was nothing more than a ruse. It does not appear from the testimony of John Verzi that his hesitancy to disclose his alibi was due to a desire to shield an innocent part, as he freely disclosed his whereabouts regarding the day of the crime until the approximate time of the commission of the crime. Only after the prosecutor's objection was sustained was testimony excluded regarding his whereabouts at the time of the crime. There can be no implication that either Mr. Valorie or Mr. Fanelly were unaware of the requirement of filing the notice of alibi, as both attorneys are able and respected members of the Bar and both familiar with criminal procedure. John Verzi had ample opportunity to make known his alleged alibi.

In Ford v. State, 121 O.S. 292, 168 N.E. 139 (1929), the defendant was indicted for first degree murder. The defendant retained an attorney to defend him. This attorney was present with the defendant at the arraignment. At the commencement of the trial, this attorney started to qualify the jurors. Thereafter, this attorney asked for and was granted leave to withdraw as defense attorney. The defendant did not object to this. Prior to the appointment of a court-appointed attorney, the second attorney of the defendant's choice made a motion for a continuance of two weeks to properly prepare the defense. The trial court overruled this motion. The second attorney of the defendant's choosing refused to proceed and the court appointed another attorney to defend the accused.

The Ohio Supreme Court held that the trial court did not err in overruling the motion for the continuance and stated that the trial court was

justified in holding that the convenience of the court, the jury and the witnesses was paramount to the right of the defendant to counsel of his personal choice.

The Supreme Court of Ohio went on to state that under the theory advanced by the appellant that the accused would be entitled to halt for an indefinite time the prosecution of his case if for one reason or another, counsel of his own choosing refused to accept the employment.

In State v. Frabutt, 88 O.L. Abs. 5, 18 O.O. 2d 277 (1961), the court stated that the fact that the trial court permitted defendant to change his mind and to hire other counsel to aid and assist in the defense does not justify a continuance in the trial at such an advanced stage of the proceedings and probably not at any stage of the proceedings.

In the case at hand, the request for a continuance was nothing more than a request to properly prepare a defense. The dictates of Section 2945.58 Ohio Revised Code must be strictly complied with. If there had not been a change of defense counsel at the last minute and the original counsel, on the day of the trial, had requested a continuance in order to file his notice of alibi, this would most properly be denied. Therefore, merely because the accused chooses to retain another attorney at the last minute, in the light of the above cases, should not change the procedure and the motion is properly denied.

The trial court's reasons for refusing the request for a continuance are set forth on Page 5, Bill of Exceptions:

> "Well, I am going to overrule the request for a continuance at this time. The reasons for it being that the affidavits in this case were made and filed on the 7th day of April, 1961; that the Defendants have had ample time, certainly, to file any defense that they wish to make in this cause. They have had, to the Court's knowledge, in between the original hiring of Mr. Koblentz and the recent hiring of Mr. Koblentz, other counsel that the Court is aware, Mr. Valorie and Mr. Fanelly of the Akron Bar.
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> This matter was originally scheduled for trial in November, and was continued because, I believe, counsel for the Defendant, Mr. Koblentz, was scheduled in other courts during the month of November. The matter was continued until this date. I am sure

that the Defendants have had ample opportunity to present notice to the prosecuting attorney, and I believe Mr. Koblentz, in chambers, has indicated to me that he notified the Defendants that this case was set for trial by mail some ten days, I think, or so, before this actual trial date; that no response was had until yesterday; and under those circumstances, I feel the Court has extended as much in the interest of substantial justice as it should be required to do, and I am going to overrule the request for a continuance."

The landmark case of Powell v. Alabama, 287 U.S. 45 (1932), is clearly distinguishable on its facts from the case at hand. In the present case, the petitioners were represently by counsel for nine (9) months prior to the trial and were ably represented at the time of trial by Mr. Koblentz. These facts, in no way, resemble or compare with the Powell case, the facts of which the court well knows. The petitioners' rights were, in no wise, jeopardized or infringed as a result of failure to grant an additional continuance. To the contrary, the trial court acted properly in overruling the procedural motion.

By analogy, I direct the court's attention to the case of Berman v. U.S., 378 U.S. 530 (1964), in which the second circuit dismissed an appeal of the accused in a felony case where the defense counsel was allegedly ill at the time and failed to comply with Rule 37 (a) (2), The Federal Rules in Procedure, perfecting his appeal. The dismissal was unanimously affirmed per curiam, without opinion June 22, 1964. Clearly, substantial justice requires that there be a procedural limit as to appeal time and likewise substantial justice dictates there be a procedural limit to the number and manner of granting continuances in a criminal case.

ISSUE

WAS THE ADMISSION INTO EVIDENCE BY THE TRIAL JUDGE OF INCRIMINATING STATEMENTS VOLUNTARILY MADE BY THE PETITIONERS WHILE INCARCERATED A VIOLATION OF THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS?

The record is clear that the petitioners were the only two individuals incarcerated in the Cuyahoga Falls Jail at the time of the conversation in

question. The direct examination of Officer Formby reveals the following testimony. (Bill of Exceptions, P. 249):

"Q. Did you have occasion to observe them by means other than face to face?

A. Yes.

Q. Either their apprehensions or deeds?

A. Yes sir.

Q. And how did you observe them?

A. Through what medium?

Q. Yes.

A. Through the microphones that are in the cell block.

Q. And that is here in jail?

A. That's correct.

Q. That's in the building here in Cuyahoga Falls?

A. Yes sir, it is.

Q. Now, you overheard them through the nicrophone that goes into the cells of the jail?

A. Yes, sir. You can turn each individual cell on, select them as you want them.

Q. And did you do this?

A. Yes."

Q. There were only two men in the jail?

A. Yes, sir."

(Continued, Bill of Exceptions, P. 251):

"Q. And you were able to ascertain that only the two Verzi brothers were in jail at this time?

A. That's correct."

The testimony of Police Chief Menzo Preston corroborated the fact that there were only two individuals in jail at the time of the overheard conversation. (Bill of Exceptions, P. 266):

"Q. So, at the time John Verzi was incarcerated, there was only one other person in the jail, and that was his brother, Anthony, according to the records you have in your hand?

A. That's correct.

It is only necessary that the identity of the accused be established with reasonable certainty. Evidence as to the identity is a question of fact for the jury's determination preliminary to the admission of the conversation. Leonard v. Mowbray, 21 O. App. 268 (1926). Petitioner himself does not take issue with this contention.

The subject matter of the conversation itself lent itself to an identification of the parties. There is abundant testimony that two individuals were stealing tires and that only one, Anthony Verzi, was apprehended by Officer Formby. The other escaped on foot, thus: (Bill of Exceptions, P. 252):

"Where did you go?' And he said,

'I ran between the houses."

Wigmore on Evidence, 1954 Edition, P. 405, in discussing the authentication of circumstantial evidence regarding telephone messages, states:

> "The needed link, however, will be supplied if the witness testifies that he recognized X's voice, or the message reveals that the speaker had knowledge of facts that only X. would be likely to know, or if other confirming circumstances makes it probable that X. was the speaker." (Emphasis added.)

As regards the identification of the pliers found by Patrolman Ball in the vicinity where Anthony Verzi was apprehended, the law in Ohio is clear that the competency of circumstantial evidence is not open to question, provided it is the best evidence which the nature of the case admits. When necessity for resort to circumstantial evidence arises either from the nature of the inquiry or the failure of direct proof, considerable latitude is allowed in the reception of the circumstantial evidence. 21 O. Jur 2d 209.

It is further clear that the speaker in the cell in which the petitioners were incarcerated was not hidden, rather was openly displayed in the cell and further that their conversation was voluntary. The conversation was not surreptitiously obtained as in the case of Massiah v. U.S., 377 U.S. 201 (1964) in which the defendant was induced to make incriminating statements which were subsequently used.

The court's attention is directed to Lopez v. U.S., 373 U.S. 427 (1963) in which the defendant's statements were recorded by means of a hidden mechanism and relayed to a concealed device. This court, in the Lopez case, held that the defendant's voluntary statements were not used in violation of his right against self-incrimination.

Therefore, the court should not long concern itself with this issue as the petitioners' statements were voluntarily made while incarcerated and were overheard and subsequently used at trial after the proper foundation was laid by the prosecutor as indicated above in Bill of Exceptions.

CONCLUSION

The respondent respectfully submits that the trial court did not abuse its discretion to the prejudice of the petitioners by refusing request for a continuance. The request for a continuance was not made until the day set for trial. The court, attorneys, jurors and prosecuting attorney were prepared for trial. The refusal to grant a continuance was not, in any manner, in violation of the petitioners' constitutional rights.

The testimony of the overheard conversation by Officer Formby was properly admitted. The identity of the speaker was established with reasonable certainty and was, in fact, weighed by the jury and found to be true. The conversation was overheard while the petitioners were incarcerated and was not, in any manner, surreptitiously obtained, but was entirely voluntary. Based on the above cited cases, it is clear that the petitioners' constitutional protection against self-incrimination was not violated in any manner. Therefore, the respondent respectfully submits that the petition for Writ of Certiorari be denied.

Respectfully submitted,

Joseph B. Killian, Attorney for
Respondent, State of Ohio